

[B-112656]

**Compensation-Promotions-Service in Grade Requirement-Assignment to Higher Grade Position Without Corresponding Rate Increase**

The service in grade requirement of section 1310 of the Supplemental Appropriation Act, 1952--Whitten Amendment--is not only an appropriation restriction on promotions but is intended to prevent "excessively rapid promotions," and therefore, an employee may not be transferred or promoted to a higher position prior to the time he meets the necessary service requirement without payment of compensation fixed for such position, also the assignment of an employee to occupy and perform the duties of a position classified in one grade while his salary is fixed in that of a position classified in a lower grade is contrary to the provisions of the Classification Act of 1949.

Comptroller General Warren to the Acting Chairman, United States Civil Service Commission, March 2, 1953:

The attention of this Office has been called to Departmental Circular No. 671, Supplement No. 11, of October 17, 1952, issued by the United States Civil Service Commission authorizing the assignment to higher grade duties of employees who do not meet the service requirements of section 1310 of the Supplemental Appropriation Act of 1952, as amended (65 Stat. 757, 758; 66 Stat. 122), commonly known as the Whitten Amendment.

Paragraph I of the circular sets forth the basic policy of the Commission as follows:

When an employee is not eligible for promotion of two grades because of the provisions of Section 1310 of the Supplemental Appropriations Act, 1952, as amended, it does not mean that an agency may not assign the higher grade duties and responsibilities to such employee. For example, an occupant of a grade GS-11 position who is otherwise eligible may be assigned GS-13 duties and responsibilities even though he is not eligible under Section 1310 for a grade higher than GS-12. In this case the agency may promote the employee to GS-12 only and state the reasons for this action in the "remarks" column of Form 30.

Paragraph IV gives two typical examples of situations in which the stated policy may be used as follows:

A. An employee who served at grade GS-11 for one year is proposed for promotion to a vacancy at grade GS-13. He does not meet the service requirement of the Whitten Amendment for the grade. However, he meets the Commission's qualifications standards for the GS-13 position. The employee may be officially assigned to the duties of the GS-13 position and promoted to and paid at grade GS-12. No position at GS-12 need be created.

B. An employee has served in a grade GS-11 position for just six months. He is proposed for a GS-12 vacancy. He meets the Commission's qualifications standards for the GS-12 position. The agency desires to have the employee's GS-11 position vacated. The employee may be officially assigned to the duties of the GS-12 position and paid at a GS-11 rate. His former GS-11 position will be considered as having been vacated.

It appears from the foregoing that the circular purports to authorize the official assignment of an employee to occupy and perform the duties of a position which legally is classified in one grade while he is to receive the salary of a position which is classified in a lower grade. In such respect, paragraph V of the circular provides:

\* \* \* In example A, above, the action would be reported as "Promotion" under authority of "C S Reg 8.108(a) (1)" or "7.106", as applicable. The "To" column would show the title of the GS-13 position, but the grade shown would be GS-12 and the salary would be that for grade GS-12. \* \* \*

\* \* \* \* \*

In example B, above, the action would be reported as a "Reassignment" under authority of "C S Reg 8.108 (a) (1)" or "7.106", as applicable. The "To" column would show the title of the GS-12 position, but the grade shown would be GS-11 and the salary would be for grade GS-11. \* \* \*

The restriction of the Whitten Amendment is not solely upon the use of appropriated funds but is upon "excessively rapid promotions" and provides expressly that "No person in any executive department or agency whose position is subject to the Classification Act of 1949, as amended, shall be promoted or transferred to a higher grade" except subject to the conditions stated therein. While the circular indicates that an employee is not to be "officially promoted" to the higher grade position until he meets the service requirements of the Whitten Amendment, the action authorized by the circular to all intents and purposes has the effect of promoting or transferring an employee into the higher position--except for the payment of the salary thereof--prior to the time he meets the necessary service requirements. Such action, in my opinion, is contrary to the applicable provisions of the Whitten Amendment and is not authorized.

Furthermore, the assignment of an employee to occupy and perform the duties of a position classified in one grade while his salary is fixed in that of a position classified in a lower grade, appears to be contrary to the provisions of the Classification Act of 1949, 63 Stat. 954, which contemplates that employees shall receive the salary provided for the grade in which the position they occupy and perform the duties of has been classified.

Moreover, this Office knows of no legal authority under the Classification Act of 1949, or otherwise, for paying an employee the salary applicable to a specified grade in which no position has been established, as in example A

above, or in which the position has been vacated, as in example B. Also, the action authorized by the circular appears to constitute the indefinite assignment of an employee to the work of a higher classified grade contrary to the provisions of 5 U.S.C. 38.

The matter has been given careful consideration but, for the foregoing reasons, I am required to conclude that the action authorized by Circular No. 671, Supplement No. 11, is improper and illegal. Accordingly, this Office will not approve payments of compensation for personnel changes hereafter made on such basis or otherwise recognize the validity of such changes.